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U.S. Citizenship and Immigration Services

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FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: OCT 01 2004

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in August 1998. It claims to be a trading company. It seeks to employ the beneficiary as its product-marketing manager.[1] Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established that: (1) the beneficiary would be employed in a managerial or executive capacity for the United States entity, or (2) the petitioner had the ability to pay the beneficiary the proffered wage. The director also observed that the petitioner had not completely complied with the director's request for additional evidence.

On appeal, the petitioner provides additional information and an apology that his attorney did not submit the information requested by the director.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
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> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

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[1] In response to the director's request for evidence, the petitioner provided a copy of its organizational chart depicting the beneficiary in the position of general manager; however, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971).

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
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> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
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> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
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> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an August 12, 2002 letter submitted with the petition, the petitioner stated that the beneficiary had been transferred to the United States entity "to work as Product Marketing Manager to take charge of further business development." The petitioner also submitted an organizational chart showing a president, an individual in the positions of general manager, sales/marketing, and customer service/technical support, an individual in operation/accounting, two individuals in inventory/shipping/RMA, and an individual assisting in sales/marketing and customer service/technical support. The chart did not identify the beneficiary in any of the positions and did not specifically identify a product marketing manager position.

The director observed that the petitioner had not submitted sufficient evidence with the petition establishing the beneficiary's employment in the United States as a manager or executive. As required by 8 C.F.R. § 103.2(b)(8), the director requested the following additional evidence on February 3, 2003: (1) a copy of the petitioner's organizational chart including the current names of all executives, managers, supervisors, and number of employees within each department; (2) a brief description of job duties, educational level, date of employment and annual salary for each employee under the beneficiary's supervision; (3) an explanation of the source of remuneration of all employees and whether the employees are on salary or paid by commission; (4) a more detailed description of the beneficiary's duties including the approximate percentage of time the beneficiary spent in each of the duties; and, (5) copies of the petitioner's California Form DE-6, Quarterly Wage Reports for all employees.

In an undated letter, the petitioner indicated the beneficiary's position would be executive and would be to fill a permanent marketing director position. The petitioner listed the beneficiary's proposed duties as:

1. Build the right company infrastructure.
2. Propose the right marketing and sales strategy.
3. Collect world-wide information in computer system technology.
4. Standardize company operation and employee policies.
5. Provide company's monthly and yearly growth target.
6. Monthly and yearly discussion meeting with employees.

The petitioner also provided a revised organizational chart showing the beneficiary in the position of general manager and listing three individuals in the positions of (1) financial and personnel departments; (2) marketing and sales departments; and (3) warehouse department. The chart also indicated that temporary staff reported to these individuals.

The petitioner's California Form DE-6 for the quarter in which the petition was filed, confirmed the employment of three individuals, the beneficiary and two individuals not identified on either version of the petitioner's organizational chart.

The director observed that: the petitioner had not submitted description of job duties, educational levels, or salaries for the employees under the beneficiary's supervision; the petitioner had not provided evidence of the employment of temporary staff; the petitioner had hired the employees on the revised organizational chart subsequent to filing the petition; and the beneficiary's position had been changed. The director noted that the petitioner had provided a general description of the beneficiary's duties. The director determined that the petitioner had not established a reasonable need for an executive because the petitioner did not possess the organizational complexity to warrant an executive position. The director determined further that the beneficiary's position would be a first-line supervisory position over non-professional employees.

On appeal, the petitioner explains that in December 2002, the previous general manager resigned and that the beneficiary was appointed to the general manager position in January 2003. The petitioner submits the following documentation, which was previously requested by the director: (1) a new organization chart including day-to-day activities, educational level, immigration status, and date of employment for the positions of general manager, marketing manager, sales manager, personnel/finance manager, and warehouse manager; (2) payroll records for 2003; and, (3) a note that two of the employee's payroll records were not available because they had joined the company in July 2003. The petitioner requests that the AAO approve the petition based upon its explanations and additional evidence.

On review, the AAO agrees with the decision of the director. The record does not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.* Under the circumstances, the AAO need not and does not consider the sufficiency of the evidence submitted on appeal.

As the director determined, the petitioner provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary does on a day-to-day basis. For example, the petitioner states that the beneficiary's duties include "Build[ing] the right company infrastructure," and "Propos[ing] the right marketing and sales strategy," and "Standardiz[ing] company operation and employee policies." The petitioner did not, however, define the goals and policies, or clarify who actually provided the market research. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating

the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In addition, the petitioner describes the beneficiary as "Collect[ing] world-wide information in computer system technology." Since the beneficiary actually performs this market research, he is performing a task necessary to provide a service or product and this duty will not be considered managerial or executive in nature. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Further, the petitioner has not provided evidence that it employed a sufficient number of employees to relieve the beneficiary from performing primarily non-qualifying duties when the petition was filed. As footnoted previously, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). The petitioner has not provided adequate explanations for the disparate organizational charts. Not only did the beneficiary's position change, but the position of president was also eliminated. The petitioner has not identified the positions held by the two employees listed on the third quarter 2002 California Form DE-6 and has not provided evidence that it employed or used the services of individuals other than the two individuals listed. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California, supra.*

In sum, the petitioner has not provided evidence to demonstrate that the beneficiary's assignment for the petitioner will be primarily managerial or executive.

The second issue in this matter is whether the petitioner established its ability to pay the beneficiary the proffered annual wage of $42,000.

The regulation at 8 C.F.R § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner initially submitted its 2000 Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return. The petitioner's fiscal year begins August 1 and ends July 31 of each year. The petitioner's 2000 IRS Form 1120 shows $1,025,901 in gross receipts, $94,057 paid in salaries, and negative taxable income of $90,486.

The director requested the petitioner's 2002 IRS Form 1120 or an explanation if it was not available. The director also requested the IRS Forms W-2, Wage and Tax Statement evidencing wages paid in 2002. As noted above, the director also requested the petitioner's California Forms DE-6. The director notified the petitioner that the requested tax forms would be used to determine the petitioner's ability to pay the proffered wage. The director also stated that the petitioner could submit audited financial statements or annual reports to substantiate its ability to pay the beneficiary the proffered wage.

In response, the petitioner provided its 2001 IRS Form 1120 that shows $1,252,848 in gross receipts, $48,467 paid in salaries, and negative taxable income of $38,771. The petitioner also provided a copy of the beneficiary's IRS Form W-2 showing $22,750 in wages paid to the beneficiary.

The director questioned the petitioner's failure to provide its IRS Form 1120 for the year 2002. The director also observed that the petitioner had experienced net losses in previous years. The director also noted that the beneficiary had been paid only $22,500 in the year 2002. The director determined that the petitioner had not established its ability to pay the proffered wage.

On appeal, the petitioner explains that his start date with the petitioner was June 16, 2002, thus his IRS Form W-2 reflected only six months of salary. The petitioner also explained that its fiscal year ends in July of each year, thus the 2002 IRS Form 1120 was not available when it responded to the director's request for evidence in April 2003. The petitioner also contends that the petitioner's claimed parent company provides funds for the petitioner's operation including payment of salaries. The petitioner also attaches several bank statements to substantiate that the claimed parent company supports the petitioner.

On review, the AAO agrees with the decision of the director. The petitioner has not established its ability to pay the proffered wage. When determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not proffer evidence that it had employed the beneficiary for one year at the proffered wage.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now CIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the

petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on September 27, 2002, the AAO must examine the petitioner's tax return covering this period. The petitioner's IRS Form 1120 for its fiscal year including the priority date has not been provided, instead, the petitioner re-submits its IRS Form 1120 for the year 2001. The petitioner does not explain the unavailability of its 2002 IRS Form 1120 in July 2003 when the appeal was filed. The petitioner has not presented other evidence that substantiates the petitioner has the ability to pay the beneficiary the proffered wage. The petitioner's contention that its claimed parent company will continue to support its operations is not sufficient. The petitioner had not provided documentary evidence that its claimed parent company is obligated to support the petitioner's operations. As stated previously, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Treasure Craft of California, supra.*

Beyond the decision of the director, the petitioner has not submitted sufficient evidence demonstrating that the beneficiary had been employed for the foreign entity in a managerial or executive capacity. The petitioner again provides a general description of the beneficiary's duties for the foreign entity. The petitioner fails to provide further detail on the beneficiary's job duties for the foreign entity despite the director's request for additional information. As stated above, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12).

The petitioner also presents confusing evidence on the issue of its ownership and control. The petitioner initially stated the petitioner was owned 100 percent by the foreign entity. However, the petitioner has submitted two stock certificates; one issued to the foreign entity in the amount of 35,000 shares, and the second issued to an individual in the amount of 15,000 shares. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

For these additional reasons, the petition will not be approved. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.